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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

GEOPHYSICAL SYSTEMS CORPORATION,
Petitioner,

v.

RAYTHEON COMPANY and SEISMOGRAPH SERVICE CORPORATION

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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10 pp

QUESTIONS PRESENTED

In cases from *Erie Railroad v. Tompkins* through *Salve Regina College v. Russell*, this Court has recognized that the constitutional and statutory imperatives of federalism require federal courts to adhere to state substantive law in diversity of citizenship cases. In the present case, the Ninth Circuit interpreted authoritative state court precedents in ways that conflict with decisions of the California courts and other federal courts of appeals. The questions presented are:

1. Whether the Ninth Circuit employed an incorrect standard for discerning "trends" in state law, in conflict with decisions of the Third and Seventh Circuits?

2. Whether federal courts have a degree of latitude to depart from state law precedents by expanding, contracting or diverging from such precedents in ways the state courts have not adopted?

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court of appeals are identified in the caption. Pursuant to Supreme Court Rule 29.1, petitioner states that there are no parent or subsidiary companies to be listed.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Geophysical Systems Corporation (GSC) petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, A1-A17) is not reported. The opinions of the district court (App., *infra*, A22-A34) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 1993. App., *infra*, A18. A timely petition for rehearing was served and filed on February 24, 1993 and was denied on May 3, 1993. App., *infra*, A20. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1988).

STATUTES INVOLVED

The Rules of Decision Act, 28 U.S.C. § 1652, provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

Additional relevant statutes are set out at App., *infra*, A35-36.

INTRODUCTION AND STATEMENT OF THE CASE

On one level, this case is a routine breach of contract claim litigated in the district court under diversity of citizenship jurisdiction. Yet it is that very typicality which reveals the peril to federalism that arises when, as here, the lower federal courts fail to adhere to binding sources of state law. A bedrock premise of the dual federal-state judiciary system is the assurance that substantive issues of state law will be decided the same way regardless of the forum. That premise is rooted in the Constitution's allocation of power between the national and state governments; it is reflected in statutes dating back to the founding of the Republic (Federal Judiciary Act of September 24, 1789, § 34 c.20, 28 U.S.C. § 1652); and it informs this Court's decisions in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938); *Lehman Brothers v. Schein*, 416 U.S. 386 (1974); and *Salve Regina College v. Russell*, 111 S. Ct. 1217 (1991). In short, it is "one of the modern cornerstones of our federalism." *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring).

The decision below reaches results contrary to governing state precedent. As this petition explains, the decision below is an ideal candidate for this Court's review because it contains several common examples of the ways lower federal courts depart from settled principles of state law: rejecting or modifying relevant precedents in favor of an amorphous "trend" in the law even where the state courts have perceived no such trend; ignoring authoritative state court constructions of state statutes; and making policy determinations at odds with holdings of the state courts. Moreover, the decision below employed a standard for discerning a governing trend in state law that conflicts with and is more lax than the standard employed by the Third and Seventh Circuits. Accordingly, this Court should grant review to continue the effort commenced in *Erie*, and revisited in *Lehman Brothers* and *Salve Regina College*, of defining the contours of federal court fidelity to state decisions on questions of state substantive law.

1. GSC, a California corporation, developed a patented technology for seismic research which represented a significant advance in the collection of seismic data and was an initial success in the market. The data amassed by GSC required computer processing capability in order to generate usable reports. Seismograph Service Corporation (SSC), a Delaware corporation with its principal place of business in Oklahoma, competed with GSC in the sale of seismic exploration devices and recognized the technological significance of GSC's breakthrough technology. Anticipating that GSC would become the industry standard for data acquisition, SSC deemed it essential to beat out its competitors by playing a role in that technology. (Tr. 11/9/88 at 166; 11/10/88 at 91-96; 11/14/88 at 6-7; Ex. 2364). [1]

SSC approached GSC (Tr. 11/16/88 at 130-31) and offered to supply data processing capability. Throughout their discussions, SSC knowingly made false representations and promises about its equipment and eventually won out over other potential suppliers to obtain a series of contracts with GSC. As SSC officials admitted in this litigation, they knew from the start that their computer equipment could not perform as promised and that they could not reasonably make any representation as to the speed capability of their computers. (ER 38-39; Tr. 11/3/88 am at 78-79, pm at 15-18; 11/4/88 at 114-118; 11/17/88 am at 37; Ex. 2021). Once installed, the SSC computers failed to work properly. In response to complaints, SSC provided false assurances that the problems would soon be solved and induced GSC to continue to contract for additional equipment. (Tr. 11/3/88 pm at 18-55.) Even when performance deadlines were extended, SSC never met many software capabilities promised in the contracts. (*Id.*) Eventually, as GSC's systems failed to provide the usable reports customers expected, customers canceled orders and terminated business dealings with GSC. (Exs. 2042, 31AA, 2232, 2846, 81, 2053, 755, 2709, 2056, 38, 2894, 2895, 2892, 2976, 2959, 36;

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[1] "Tr." refers to the trial transcript; "ER" refers to the Excerpts of Record filed in the Ninth Circuit; "Ex." refers to exhibits in the record.

Tr. 11/17/88 am at 29-38, 46-48; 11/3/88 pm at 90-97). GSC's once-thriving business withered, leading to the company's bankruptcy. App., *infra*, A2. Evidence in this case also showed that SSC sought to exploit GSC's situation to its own competitive advantage and that SSC similarly victimized other customers; indeed, SSC's vice president testified that SSC regularly made false promises to customers. (Tr. 11/9/88 at 139-42; 11/16/88 at 37-42; Ex. 2008).

2. Following its discovery of SSC's fraud, GSC filed suit in the United States District Court for the Central District of California on December 23, 1985, based on diversity jurisdiction under 28 U.S.C. § 1332 and federal question jurisdiction under § 1331. The complaint alleged state law claims for fraud and negligent misrepresentation, unfair competition, breach of contract, warranty and the implied covenant of good faith, and federal claims for violation of the RICO statute. After a two-month trial in 1988, the jury awarded GSC $48,302,515 in damages.

Subsequent to the trial, the district court, reversing rulings it made earlier in the case regarding statute of limitations issues, granted JNOV on several claims. In particular, the court held that the statute of limitations for breach of the implied covenant of good faith did not run from the date of discovery. The court reached this conclusion in reliance on a recent California Supreme Court decision having nothing to do with the statute of limitations, but which the district court nonetheless regarded as a harbinger of a *trend* in state law. App., *infra*, A13. The district court also granted a new trial on certain contract-related claims. Thus limited, the second trial resulted in a verdict in favor of SSC. Thereafter, the district court entered a final judgment dismissing all claims except the state law claim for unfair competition, on which the court entered judgment for GSC in the amount of $2,550,452.65. App., *infra*, A33.

3. The United States Court of Appeals for the Ninth Circuit reversed the judgment in favor of GSC on the state law unfair competition claim, remanded for entry of

JNOV on that claim, and affirmed the dismissal of all other claims by GSC. App., *infra*, A1-A17.

The Ninth Circuit's opinion is characterized by holdings on state law issues that conflict with binding California precedent. Accordingly, the outcome differs from the result that would have obtained in state court or in other circuits that follow stricter standards for adhering to state court precedent.

Several examples illustrate the point.

a. On the claim for breach of the implied covenant of good faith, the court of appeals held that GSC's claim is barred by the statute of limitations because the "discovery" rule does not apply to such claims. The court reached this conclusion despite the express holding in *April Enterprises, Inc. v. KTTV*, 195 Cal. Rptr. 421 (Ct. App. 1983), that the discovery rule is applicable to implied covenant of good faith claims. Relying on a decision by the California Supreme Court (*Foley v. Interactive Data Corp.*, 254 Cal. Rptr. 211 (1988)) that does not even address the relevant statute of limitations issue, the Ninth Circuit concluded that *April Enterprises* "was no longer good law." App., *infra*, A12. Although it acknowledged that "*April Enterprises* was not effectively overruled by *Foley*," the Ninth Circuit nonetheless accepted the view that *Foley* evidenced a "trend."[2] App., *infra*, A13. In so holding, the opinion below ignored a more recent decision of the California Supreme Court that does involve the statute of limitations and that cites *April Enterprises* with approval (*Prudential-LMI Commercial Insurance v. Superior Court*, 274 Cal. Rptr. 387 (1990)).

b. On the unfair competition claim, the Ninth Circuit held that GSC was not injured "beyond the risk of loss any party entering into a contract to buy goods assumes." App., *infra*, A16. Despite GSC's recitation of

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[2] Unless indicated otherwise, emphasis within quotations has been added.

numerous cases in which California courts routinely uphold claims for unfair competition in these circumstances, the court addressed only *Barquis v. Merchants Collection Association*, 101 Cal. Rptr. 745 (1972). The court stated that "*Barquis* does not hold that injury to a competitor satisfies the statutory definition of competitive injury. Rather, *Barquis* refers specifically to the statutory requirement of proving an *'unfair* . . . injury to a competitor.'" App., *infra*, A16 (emphasis supplied by court). Based on a standard of its own creation, the Ninth Circuit rejected as a matter of law the verdict of a correctly-instructed jury and dismissed a claim that the state courts uniformly vindicate.

c. With respect to the fraud and misrepresentation claim, the court of appeals affirmed the district court's holding that Oklahoma's two-year statute of limitations applied instead of California's three-year statute. *Id.* at A8. In the Ninth Circuit's view, no weight can be accorded to an Oklahoma borrowing statute which requires Oklahoma courts to defer to California's longer statute of limitations in the circumstances of this case. *Id.* But, under California's "impairment of governmental interests" test, the state courts routinely hold that California residents are entitled to apply California's statute of limitations in situations where the sister state exhibits the flexibility and deference that Oklahoma does here.

REASONS FOR GRANTING THE PETITION

Fundamental concepts of federalism require that United States courts exercising diversity jurisdiction apply state law as it exists without expanding in directions in which the state has not chosen to embark. *Erie*, 304 U.S. at 78; 28 U.S.C. § 1652 (in diversity of citizenship cases, state law "shall be regarded as rules of decision in civil actions in the courts of the United States"). This directive applies whether the law of the state is embodied in statutes or in decisions of state courts. *West v. AT&T*, 311 U.S. 223, 236-37 (1940); *Erie*, 304 U.S. at 78. In the 55 years since *Erie*, this Court has been called upon to uphold this imperative of

federalism by defining the latitude available to federal courts in interpreting state law. *E.g., Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 212 (1960); *Lehman Bros. v. Schein*, 416 U.S. 386, 389-90 (1974); *Salve Regina College v. Russell*, 111 S.Ct 1217, 1218 (1991). These decisions were all designed to avoid the risks of the "divergent development of state law" between federal and state courts and to prevent the creation of "a dual system of enforcement of state-created rights, in which the substantive rule applied to a dispute may depend on the choice of forum." *Salve Regina College*, 111 S.Ct. at 1221.

Beyond the need to forestall federal intrusion upon the state's prerogative to determine state law, this Court has also interceded to discourage the forum-shopping and unfairness that inevitably result if federal courts may depart from the substantive principles of state law. This case presents a particularly apt opportunity for this Court to prescribe standards for the lower federal courts to follow: (1) in discerning whether state courts have authoritatively resolved an issue and (2) in predicting or announcing "trends" in state law that permit precedents to be discarded.

Review is also warranted because the courts of appeals have employed conflicting standards for guiding the discretion of a federal court sitting in diversity to interpret state law in the absence of a controlling ruling by the state supreme court.[3] In contrast to the decision below, the Third and Seventh Circuits have refused to accept generalized trends as a basis for disregarding state law cases on point. *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 617 (3d Cir. 1992); *In re Air Crash Disaster Near Chicago, Illinois*, 771 F.2d 338, 340 (7th Cir. 1985). The practical effect of these conflicting standards is exemplified by this case since other circuits

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[3] *See, e.g., Employers Ins. of Wausau v. Albert D. Seeno Constr. Co.*, 945 F.2d 284 (9th Cir. 1991) (decisions of intermediate courts "represent *data* that a federal court must consider"); *J.C. Wyckoff & Assoc., Inc. v. Standard Fire Ins. Co.*, 936 F.2d 1474 (6th Cir. 1991) (such decisions are "not to be disregarded" unless federal court "is convinced" otherwise); *Garnac Grain Co, Inc. v. Blackley*, 932 F.2d 1563, 1570 (8th Cir. 1991) (federal court "must follow" decisions of intermediate state appellate courts "when they are the best evidence" of state law).

have analyzed the very California cases at issue here in ways that differ from the opinion below.

1. Federalism Requires Uniformity Of Decisions

Aside from the constitutional and statutory underpinnings of *Erie*, this Court also has perceived the "twin aims"-- of "discouragement of forum-shopping and avoidance of inequitable administration of the law." *Salve Regina College*, 111 S. Ct. at 1221 (quoting *Hanna v. Plumer*, 380 U.S. at 468). In recent years the Court has recognized that additional steps are necessary in order to promote these twin aims. For example, in *Clay* and *Lehman Brothers* the Court reaffirmed the ability of the federal courts to utilize a state's certification procedures on unsettled issues of state law, in order to assure that the outcome of a case will not be altered by the forum.[4]

More recently, in *Salve Regina College* the Court held that a "court of appeals should review *de novo* a district court's determination of state law." *Salve Regina College*, 111 S. Ct. at 1221. This holding, which limited district courts' discretion in interpreting state law, was designed to avoid the potential "divergent development of state law among the federal trial courts even within a single State" and to preclude "a dual system of enforcement of state-created rights, in which the substantive rule applied to a dispute may depend on the choice of forum." *Id.* at 1222.

Clear guidance on how the federal courts are to treat decisions by intermediate state appellate courts on issues of state law in the absence of a flatly controlling state supreme court decision is all the more necessary in the current environment where 70% of federal appellate decisions are

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[4] Not all states have enacted procedures for certification of state law questions to the state supreme court. California has no certification provision. *See Los Angeles Memorial Coliseum Commission v. NFL*, 791 F.2d 1356, 1362 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987).

unpublished.[5] The prevalence of unpublished opinions hinders the ability of state supreme courts to detect and correct errors in the application of state law. Since unpublished opinions, such as the opinion below, are deemed not to have precedential value and are not officially reported, they may mask a divergence from state court decisions and affect the state supreme court's exercise of its discretionary jurisdiction. For example, where state appellate courts are in accord on an issue the state supreme court may see no need to grant review. But review might well be warranted, even where the state courts are in accord, in order to correct the differing view of a federal court. Accordingly, the issuance of unpublished opinions that expand upon, contract, or predict state court decisions may have a doubly negative impact on federalism concerns: first, by intruding on the state court's authority to interpret state law; second, by forestalling corrective decisions of the state supreme court.[6]

The effect on litigants is also resounding. Not only are certainty and fairness diminished if forum selection is outcome determinative, but parties litigating state law issues in federal court lack the opportunity to seek review in the state supreme court on incorrect legal rulings.

The court of appeals' unpublished opinion in the present case illustrates the pitfalls of conferring broad discretion on federal courts to predict, expand upon, or depart from authoritative state court decisions. The Ninth Circuit diverged from settled state law on three significant issues in this case.

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[5] Analysis and Reports Branch, Administrative Office of the U.S. Courts, Federal Judicial Workload Statistics Report app. at 29 (1991) (Table S-5).

[6] *See* William L. Reynolds and William M. Richman, *The Non-Precedential Precedent -- Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167 (1978); Donald R. Songer, Danna Smith and Reginald Sheehan, *Nonpublication in the Eleventh Circuit: An Empirical Analysis*, 16 Fl. St. U. L. Rev. 963 (1989); Daniel N. Hoffman, *Nonpublication of Federal Appellate Court Opinions*, 6 Just. Sys. J. 405 (1981); Comment, *A Snake in the Path of the Law: The Seventh Circuit's Non-Publication Rule*, 39 U. Pitt. L. Rev. 309 (1977).

2. Review Is Warranted To Preclude The Courts Of Appeals From Predicting Non-Existent Trends In State Law

First, the Ninth Circuit disregarded decisions of the California state courts on the application of the discovery rule to the statute of limitations for breach of the implied covenant of good faith. The court held that *April Enterprises* must be reinterpreted in light of *Foley v. Interactive Data Corp.*, a decision by the California Supreme Court involving no statute of limitations issue at all. *Foley* simply held that "contractual remedies should remain the sole available relief for breaches of the implied covenant . . . in the employment context." 254 Cal. Rptr. at 237.

California courts meticulously note that *Foley* arose in an employment context and dealt only with remedial issues. Indeed, in *Newman v. Emerson Radio Corp.*, 258 Cal. Rptr. 592, 593 (1989),[7] the California Supreme Court explained that "[i]n *Foley* . . . we held that *in the context of an alleged wrongful discharge from employment* . . . an employee may not obtain tort relief for breach of the implied covenant." *See also Nedlloyd Lines B.V. v. Superior Court*, 11 Cal. Rptr. 2d 330, 346-47 (1992) (Kennard, J., concurring and dissenting) (the California Supreme Court has "declined to extend tort remedies for breach of the implied covenant to breaches of *employment* contracts"); *Shoemaker v. Myers*, 276 Cal. Rptr. 303, 317 (1990) (citing *Foley* for proposition that cause of action for tortious breach of the implied covenant, "*in the employment context*, cannot support an award of tort damages").

In accord with the California courts, other federal appellate courts also apply *Foley* only to labor cases. *See, e.g., McMahon v. Pennsylvania Life Ins. Co.*, 891 F.2d 1251, 1256 (7th Cir. 1989) ("The leading California Supreme Court case involving the implied covenant of good faith and fair dealing *in an employment termination* case is *Foley*"); *Tolan v.*

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7 Chief Justice Lucas, the author of the court's opinion in *Newman*, was also the author of the court's opinion in *Foley*.

Levi Strauss & Co., 867 F.2d 467, 472 (8th Cir. 1989) (citing *Foley* as holding that "*in the employment context*, cause of action seeking tort remedies for breach of implied covenant is not permitted"). Thus, the decision below conflicts not only with interpretations of *Foley* by the state courts but by the federal courts as well. The novel extension of *Foley* in the opinion below to a situation outside the labor context and to an issue not even addressed in *Foley* encourages forum-shopping not only between federal and state court, but also among the federal courts themselves.

Contrary to the decision below, the California Supreme Court and the intermediate state appellate courts continue to cite the statute of limitations holding of *April Enterprises* with approval. *See Prudential-LMI*, 274 Cal. Rptr. at 391.[8] Indeed, the underlying court of appeal opinion in *Prudential-LMI* contains an extended discussion of *April Enterprises*. *See* 260 Cal. Rptr. 85, 96-99 (Ct. App. 1989). If, as the Ninth Circuit held, the statute of limitations holding of *April Enterprises* must be revisited in light of *Foley*, that conclusion has escaped the state courts, including the supreme court, which still cites *April Enterprises* approvingly with no mention of *Foley*.

In contrast to the opinion below, other circuits are more circumspect in predicting "trends" in state law. The Third Circuit in *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 617 (3d Cir. 1992), in interpreting the state's public policy exception to the at-will employment doctrine, refused to recognize a trend based on recent state supreme court decisions which had cast serious doubt on the viability of the exception, concluding that it was "aware of no 'persuasive evidence of a change in Pennsylvania law.'" Instead, the Third Circuit applied state law as it had been interpreted by the state's intermediate appellate courts which continued to recognize the exception.

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8 Chief Justice Lucas was also the author of the supreme court's opinion in *Prudential-LMI*.

The Seventh Circuit followed a similarly deferential approach in *In re Air Crash Disaster Near Chicago, Illinois*, 771 F.2d 338, 340 (7th Cir. 1985), involving Illinois' wrongful death statute. Although the Illinois Supreme Court recently had expanded the scope of the statute to permit compensation for loss of society to those in parent-child relationships, the state supreme court had not ruled on the narrow issue before the Seventh Circuit: whether adult siblings of victims could recover for loss of society. A state appellate court had ruled on that very issue, denying coverage to adult siblings. The district court in *Air Crash*, however, held to the contrary, and the Seventh Circuit reversed: "The Illinois Supreme Court may someday hold that an adult sibling can recover for loss of society under the Illinois Wrongful Death Act, but we decline to take that expansive step for the Court." *Id.* at 340.

The divergence between the opinion below and the more measured standard employed by the Third and Seventh Circuits in divining "trends" in state law demonstrates the need for clear guidance from this Court on the discretion a federal court has to depart from established state law (as determined by intermediate appellate courts) and to predict trends in state law.

3. Review Is Warranted To Define When, If Ever, A Federal Court May Depart From Settled Principles Of State Law.

The Ninth Circuit disregarded twenty years of established state law on GSC's claim for unfair competition under Cal. Bus. & Prof. Code § 17200. App., *infra*, A35. The statute broadly defines unfair competition to include any "unlawful, unfair or fraudulent business practice." *Id.* Consistent with that expansive mandate, the state courts recognize the statute must be "broadly interpreted to bar all ongoing wrongful business activity in any context in which it appears." *People v. Dollar Rent-A-Car-Sys.*, 259 Cal. Rptr. 191, 197 (Ct. App. 1989). *Accord, People v. Casa Blanca Convalescent Homes, Inc.*, 206 Cal. Rptr. 164, 177 (Ct. App. 1984). The Ninth Circuit's confining interpretation pays no heed to such recent authoritative state court decisions and is

contrary to this Court's admonition that "[a] federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the state in which the federal court sits." *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4 (1975). *See also Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2198 (1993) ("[t]here is no doubt that we are bound by a state court's construction of a state statute").

Although the one case upon which the Ninth Circuit relied, *Barquis v. Merchants Collection Association* 101 Cal. Rptr. 745 (1972), was an important milestone in expanding the scope of §17200, state court interpretation of the statute did not cease when that case was decided more than twenty years ago. In particular, the decision in *Allied Grape Growers v. Bronco Wine Co.*, 249 Cal. Rptr. 872 (Ct. App. 1988) reveals the inconsistency between the Ninth Circuit's decision and the current state court interpretation of the statute. The court in *Bronco Wine* upheld a statutory unfair competition claim arising from a contractual dispute between two parties. In so holding, the state court rejected the stated rationale of the Ninth Circuit in this case. For example, the court rejected the contention that § 17200 did not apply because the plaintiff was "a single entity operating under a single contract." 249 Cal. Rptr. at 884. Moreover, the court noted that although there was evidence that defendant victimized others with the same practice, "[t]here is nothing in the word 'practice' that necessarily limits Section 17200 cases to those actions involving multiple victims." *Id.*

Had GSC's claim been litigated in state court, the jury verdict in its favor would have been upheld. The gravamen of GSC's unfair competition claim is that it was defrauded; fraud is sufficiently "unfair" to satisfy any reasonable interpretation of the statute. But, because the Ninth Circuit failed to adhere to the statutory interpretation of the state courts, the forum altered the outcome.

A further example of the Ninth Circuit's failure to follow settled principles of state law is its holding on the statute of limitations governing GSC's claim of fraud.

Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487, 496 (1941), requires that the conflicts of laws rules to be applied by a federal court must conform to those prevailing in the state in which the federal court sits. But the court below disregarded California state law on the choice of law issue. Although the Ninth Circuit held (App., *infra*, A8) that the district court "carefully analyzed the choice of law problem presented here and correctly identified and applied the relevant legal principles," the district court merely noted that Oklahoma has a two-year statute, California has a three-year statute, and then simply applied Oklahoma's. ER 83-84. The district court reached this conclusion only by denying any significance to Oklahoma's "borrowing statute" (12 Okla. Stat. § 105 (App., *infra*, A34)) that requires Oklahoma courts to apply the *longer* statute of limitations to claims that accrue outside of Oklahoma. The court of appeals agreed that the borrowing statute is "inapplicable because Oklahoma is not the forum state." App., *infra*, A8.

What the Ninth Circuit failed to perceive is that while the Oklahoma borrowing statute is a conflicts provision, it is highly probative in the comparative impairment of interests analysis required by California law. *See Offshore Rental Co. v. Continental Oil Co.*, 148 Cal. Rptr. 867, 873 (1978); *Reich v. Purcell*, 63 Cal. Rptr. 31, 34 (1967); State courts place great importance on "the relative commitment of the respective states to the laws involved." *Offshore Rental*, 148 Cal. Rptr. at 873. The borrowing statute evidences Oklahoma's flexibility and its willingness to have longer statutes of limitation apply, compelling the conclusion that no Oklahoma interest would be impaired by allowing a California resident the benefit of California's three-year period. The court also disregarded California's general preference for applying its own law. *Dixon Mobile Homes, Inc. v. Walters*, 122 Cal. Rptr. 202, 208 (Ct. App. 1975); *Kasel v. Remington Arms Co.*, 101 Cal. Rptr. 314, 327 (Ct. App. 1972).

These examples illustrate the uncertainty and unfairness that result when a federal court has latitude to impose a policy gloss on state law issues. Forum shopping is plainly encouraged; and the power to remove a case to

federal court has substantive ramifications that are often dispositive. The same factors that warranted certiorari in *Clay, Lehman Brothers* and *Salve Regina College* are present here. Accordingly, this case provides a fitting opportunity for this Court to take the much-needed next step in assuring the uniformity of decisions that is essential to our system of federalism.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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July 30, 1993

APPENDICES

APPENDIX A

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEOPHYSICAL SYSTEMS CORPORATION, Plaintiff-Appellant/ Cross-Appellee v. RAYTHEON COMPANY, INC; SEISMOGRAPHIC SERVICE CORPORATION, Defendants - Appellees/ Cross-Appellant	Nos. 90-56373, 90-56374 D.C. No. CV-85-8359-AWT MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
A. Wallace Tashima, District Judge, Presiding

Argued and Submitted October 5, 1992
San Francisco, California

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: TANG, PREGERSON, and ALARCON, Circuit Judges.

Geophysical Systems Corporation ("Geophysical") is a now-bankrupt business that conducted seismic research and manufactured equipment to conduct this research. Before it also went bankrupt, Seismograph Service Corporation ("Seismograph") manufactured computer equipment for measuring seismic activity. Seismograph is a subsidiary of Raytheon Company ("Raytheon"). Geophysical is a California corporation; Seismograph is a Delaware corporation with its principal place of business in Oklahoma.

Geophysical and Seismograph had two contracts under which Seismograph would sell to Geophysical computer equipment for seismic research. The two contracts were signed in February and August 1981, respectively.

On December 21, 1987, approximately three years after Geophysical went bankrupt, Geophysical filed suit against Seismograph on various contract and warranty theories, for negligent and/or intentional misrepresentation, for violating California's unfair competition law, and for violating civil RICO. Geophysical also named Raytheon as defendant, and argued that Raytheon should be held liable as Seismograph's alter ego.

We have diversity jurisdiction under 28 U.S.C. § 1332 and federal question jurisdiction under 28 U.S.C. § 1331. We affirm in part, reverse in part, and remand for proceedings consistent with this disposition.

Background

The district court held two trials in this case, both of them jury trials.

The district court disposed of Geophysical's RICO claim in favor of Seismograph and Raytheon on summary judgment and denied Geophysical's motion for reconsideration on this issue.

Before the first case went to the jury, Raytheon and Seismograph filed several motions for directed verdict. The district court granted some of the motions.

First, the district court dismissed all of Geophysical's claims against Raytheon on the ground that Raytheon was not liable as an alter ego for Seismograph's actions.

Second, the district court dismissed all of Geophysical's fraud and misrepresentation claims as barred by Oklahoma's two-year statute of limitations.

Third, the court held that all of Geophysical's breach of warranty and breach of contract claims under the August 1981 contract were barred by the two-year limitations period provided in the contract. The district court rejected Geophysical's challenges to the validity of that provision.

Finally, in a later order, the district court held that Geophysical's breach of contract claims under the February 1981 contract were barred by California's four-year statute of limitations. The district court rejected

Geophysical's contentions that the statute was tolled by Seismograph's promises to perform under the contract.

With these issues resolved, the jury only had to decide:

1. contract-released disputes arising out of the February 1981 contract, namely:

> (a) breach of express and/or implied warranty under the February 1981 contract, and;
>
> (b) breach of the implied covenant of good faith and fair dealing under the February 1981 contract, and;

2. violation of California laws against unfair competition.

The jury returned a $48 million verdict against Seismograph. The parties dispute whether the jury rendered a special or general verdict.

After the jury's verdict, the district court granted in part and denied in part Seismograph's motion for judgment notwithstanding the verdict or for a new trial. in addition, the district court withheld consideration of Seismograph's motion for judgment notwithstanding the verdict or for a new trial on Geophysical's unfair competition claim. After the second trial on Geophysical's contract-related claims, the district court ruled on Seismograph's motion on the unfair competition claim. The district court denied Seismograph's motion based on Geophysical's acceptance of a remittitur of all damages on

the unfair competition claim in excess of $1.9 million. The district court then entered judgment on the remaining verdicts from the first and second trial and resolved motions for attorney's fees, costs, and pre- and post-judgment interest.

The parties raise numerous issues on appeal. We deal with each in turn.

Analysis

I. Issues Arising From the First Trial

A.

On November 25, 1986, the district court granted summary judgment in favor of both defendants on the RICO claim. Exhibit B, ER 28-9. Geophysical argues on appeal that the district court erred. We review a district court's decision on summary judgment de novo. Kruso v. International Tel. & Tel. Corp., 872 F.2d 1416, 1421 (9th Cir. 1989), cert denied, 496 U.S. 937 (1990). We agree with the district court that summary judgment in favor of Seismograph and Raytheon on the civil RICO claim was proper.

The district court dismissed the RICO claim on the ground that Geophysical had not met its burden of producing evidence to prove the essential elements of a RICO claim against either Raytheon or Seismograph. Specifically, the district court found that Geophysical had not adduced sufficient evidence to show enterprise and pattern. ER 29.

On October 28, 1987, the district court denied plaintiff's motion for reconsideration on the RICO claim. Exhibit C, ER 30-32. The district court also denied plaintiff's request for leave to amend its pleadings on this issue, noting that it would be futile and cause delay. ER 31-2.

The district court's interpretation of the RICO enterprise and pattern requirements are questions of law that we review de novo. Ticor Title Ins. Co. v. Florida, 937 F.2d 477, 450 (9th Cir. 1991). We agree with the district court that the evidence presented could not plausibly support Geophysical's allegation that Seismograph's conduct violated RICO. The pattern of conduct described by Geophysical as a RICO violation was merely negotiation between two contracting parties. Geophysical provides little indication that Seismograph's acts as alleged in the RICO claims were directed at anything more than the singular purpose of inducing Geophysical to acquire Seismograph's computers. This is not sufficient to show the necessary pattern of racketeering activity. See Sever v. Alaska Pulp Corp., Nos. 91-36067, 91-36074, slip op. 12799, 12809-11, 1992 WL 301752 (9th Cir. Oct. 26, 1992) (multiple acts amounting to no more than a single episode having a singular purpose insufficient to show pattern).

As the Supreme Court held in Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986), "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims." The facts as alleged before the district court and on this appeal could not reasonably be resolved in favor of Geophysical on its RICO claim. Summary judgment was therefore

appropriate. See also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

B.

Before the case went to the jury, the district court issued a series of orders granting some of defendants' motions for directed verdict. See Exhibits E-G, December 7, 1988; Exhibit H, December 14, 1988.[1]

1.

The district court granted Seismograph's motion for a directed verdict on Geophysical's fraud and misrepresentation claims. Exhibit F, ER 74; Exhibit I, ER 83-4. The district court held that these claims were governed by Oklahoma's two-year statute of limitations. ER 74. Further, the district court found that Geophysical

---

[1] First, the district court granted Raytheon's motion for a directed verdict and dismissed all claims against Raytheon. Exhibit E, ER 71-2. The district court rejected Geophysical's argument that Raytheon and Seismograph were alter egos. On appeal, Geophysical argues that the district court erred by granting the directed verdict in favor of Raytheon. In addition, Geophysical filed a motion asking us to invoke judicial estoppel against Seismograph on the question whether it was Raytheon's alter ego.

Because we conclude that Seismograph was not liable to Geophysical for any of the causes of action brought in this lawsuit, we need not reach the question whether Raytheon would be liable on Seismograph's behalf.

should have and actually did discover the fraud more than two years before filing its lawsuit. ER 74, 87-89.

Geophysical contends on appeal that the district court erred by applying Oklahoma's two-year statute of limitations to the fraud and misrepresentation claims. We review a district court's decision on choice of law de novo, Sparling v. Hoffman Constr. Co., 864 F.2d 635, 641 (9th Cir. 1988), and conclude that Geophysical's contention is unavailing.

The district court carefully analyzed the choice of law problem presented here and correctly identified and applied the relevant legal principles. ER 83-84. The court properly rejected Geophysical's argument that the Oklahoma borrowing statute should apply. The Oklahoma borrowing statute is a choice of law provision which is inapplicable because Oklahoma is not the forum state. A federal court should apply the forum state's choice of law rules. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). California, not Oklahoma, is the forum state. Consequently, California's governmental interests test determines choice of law. We agree with the district court that under this rule, Oklahoma's shorter statute of limitations should apply.

The district court also dismissed all of Geophysical's breach of warranty and breach of contract claims under the August 1981 contract. The court held that these claims were barred by the two-year limitations period provision in the contract. ER 76. On appeal, Geophysical reasserts the argument it made to the district court that the Oklahoma UCC provision allowing parties to agree to a shorter limitations period than would otherwise apply is a violation of Oklahoma's state

constitution. The district court rejected the argument and so do we. See ER 80-83.

Contrary to Geophysical's contention on appeal, the Oklahoma UCC provision is not special legislation that would violate the Oklahoma constitution. Oklahoma's UCC provision allows contracting parties to agree to a shorter limitations period than would otherwise apply. See Okla. Stat. tit. 12A, § 2-725. That section applies to the entire class of claims that UCC Article 2 creates for contracts involving the sale of goods. Unlike the special legislation in Reynolds v. Porter, 760 P.2d 816 (Okla. 1988), section 2-725 does not subdivide the class of potential plaintiffs that Article 2 creates. Cf. id. at 823 (statute of limitations applicable to actionable medical malpractice claims invalid for having carved that subclass of claims out of broader claims).

3.

On December 14, 1988, the district court ruled that California's four-year statute of limitation barred Geophysical's claims for breach of contract under the February 1981 contract. On appeal, Geophysical contends that the district court's decision was erroneous. We review the district court's interpretation of state law de novo. Salve Regina College v. Russell, 111 S. Ct. 1217, 1221 (1991).

The district court rejected Geophysical's argument that Seismograph's promises to perform had the effect of tolling the statute. Specifically, the district court rejected the analogy to promises to repair in a breach of warranty action and held that Geophysical's tolling argument does not apply to Seismograph's promises to perform. ER 93-

98. We agree. The district court properly concluded that California's four-year statute of limitation barred Geophysical's claims for breach of contract under the February 1981 contract.[2]

C.

On March 16, 1989 the district court ruled on Seismograph's motion for judgment NOV or for a new trial. Exhibit H, ER 77. The motion was granted in part and denied in part. On appeal, Geophysical contends that the district court erred by granting the motion in part.

A district court's decision to grant a motion for a new trial is reviewed for abuse of discretion. Hard v. Burlington N. R.R., 870 F.2d 1454, 1461-62 (9th Cir. 1989).

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[2] During the second trial, Geophysical attempted to revive its claim for breach of contract by arguing that some provisions of the February 1981 contract were warranties. The district court rejected the argument and ruled in limine on a motion brought by Seismograph that evidence of those provisions was inadmissible except as it would relate to claims that Seismograph breached implied and/or express warranty provisions that were genuinely at issue in the second trial. Further, the district court concluded that Geophysical failed to raise these issues in a timely fashion, and therefore waived any warranty claims based on these provisions of the February contract.

On appeal, Geophysical argues that the district court's ruling on Seismograph's motion was error. The argument is without merit.

1.

The district court initially denied Seismograph's motion for a new trial with respect to all issues of liability on the contract and contract-related claims. ER 78. Several months later, the district court reconsidered its decision and granted Seismograph's motion for a new trial on some of the contract-related liability issues. Exhibit K, ER 100-104.[3]

On appeal, Geophysical contends that the district court erred by granting Seismograph's motion. For the reasons set forth below, we reject this contention.

Based on an analysis of recent California case law, the district court concluded that it had erred by instructing the jury to apply a discovery rule to Geophysical's claim that Seismograph had breached the implied covenant of good faith and fair dealing. ER 102. The court noted that a recent California Supreme Court case made clear that an action for breach of the implied covenant is strictly a contract action under California law. See Foley v. Interactive Data Corp., 765 P.2d 373, 389 (Cal. 1988).[4] As such, a discovery rule would not apply to Geophysical's implied covenant claim because such a rule normally applies only to tort claims. April Enters., Inc. v. KTTV,

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[3] The court's reasoning is provided in the memorandum and in the transcript of proceedings from the previous day. See Exhibit L, ER 105-112.

[4] The only exception to this rule is that tort damages may be assessed for breach of the implied covenant where a special relationship has been established. Foley, 765 P.2d at 394.

195 Cal. Rptr. 421, 435 (Cal. Ct. App. 1983). The district court granted Seismograph's motion for judgment NOV and a new trial based on its conclusion that the instruction to the jury applying the discovery rule to Geophysical's implied covenant claim was error.[5]

Geophysical argues on appeal as it did before the district court that Seismograph's motion should not have been granted. According to Geophysical, the discovery rule does apply to its claims that Seismograph breached the implied covenant of good faith and fair dealing. Geophysical concedes that its implied covenant claim is strictly a contract action, but argues that the discovery rule applies nonetheless under the April Enterprises exception. In April Enterprises, the California Court of Appeal held that the discovery rule can apply in a contract action where the nonbreaching party shows that the breaching party concealed its improper conduct. April Enterprises, 195 Cal. Rptr. at 437.

The district court rejected this argument and concluded that April Enterprises was no longer good law in light of the California Supreme Court's decision in Foley.

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[5] The district court further ordered that the new trial would be limited to implied covenant claims arising from Seismograph's conduct after December 23, 1981. The rationale for this limitation was that without a discovery rule, California's four-year statute of limitations would bar Geophysical's implied covenant claim for any conduct by Seismograph that occurred more than four years before Geophysical filed its lawsuit on December 23, 1985.

We agree with the district court that April Enterprises must be reinterpreted in light of the California Supreme Court's decision in Foley. The clear trend in California law is to limit availability of tort damages in contract actions to only those cases where a special relationship is shown. In accordance with that trend, the April Enterprises exception would apply only to those contract actions where a special relationship is shown. No such relationship is shown or even alleged by Geophysical.

The district court properly granted Seismograph's motion. Although April Enterprises was not effectively overruled by Foley, its scope was limited. The district court correctly concluded that the discovery rule should not apply to Geophysical's contract claim for breach of the implied covenant of good faith and fair dealing.

2.

On the issue of damages for Geophysical's contract-related claims, the district court granted Seismograph's motion and ordered a new trial. Geophysical argues on appeal that this was an abuse of discretion.

The district court held that "[t]he amount of the verdict is grossly excessive, contrary to the great weight of the evidence, and probably infected by prejudice." ER 78. The court noted that prejudice likely arose from presentation of extensive evidence on claims which later were not presented to the jury because they were dismissed in the series of rulings granting directed verdict.

The district court did not err by ordering a new trial. By the time the case was finally presented to the jury, volumes of evidence had been introduced, much of

it irrelevant to the relatively small number of issues ultimately left for the jury to decide. We agree with the district court that this evidence would have a prejudicial effect on the jury.

Geophysical also contends on appeal that the district court erred by ordering a new trial on damages because the jury rendered a special verdict. We disagree. The district court properly determined that the jury's verdict could not be sufficiently disaggregated and that a new trial on damages was therefore required. The district court did not abuse its discretion by awarding Seismograph a new trial on damages.

II. Issues Arising from the Second Trial

The second trial began on April 17, 1990 and lasted two months. Pursuant to the district court's orders before and after the first trial, the second trial would resolve only the following issues of liability and damages:

> 1. whether Seismograph breached an express warranty in the February 1981 contract;
>
> 2. whether Seismograph breached an implied warranty of fitness for a particular purpose under the February 1981 contract; and
>
> 3. whether Seismograph breached the implied covenant of good faith and fair dealing after December 23, 1981.

ER 103.

The jury returned a verdict for Seismograph. On August 13, 1990, the district court ruled on various post-trial motions. Exhibit M, ER 113-16.

The district court denied Seismograph's motion, filed after the first trial, for judgment NOV or a new trial on Geophysical's unfair competition claim.[6] On cross-appeal, Seismograph argues that the district court erred by denying its motion for judgment NOV or new trial. Seismograph maintains that Geophysical failed to prove the elements of a violation of California's unfair competition statute and therefore judgment NOV was proper. We agree.[7]

Denial of a motion for judgment NOV is inappropriate when it is clear that the evidence and its inferences cannot reasonably support a judgment in favor of the opposing party. Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1014 (9th Cir. 1985), cert. denied, 474 U.S. 1059 (1986). We conclude that the

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[6] Initially, the district court had granted Seismograph's motion for jnov on Geophysical's claim that Seismograph violated California's unfair competition law. ER 77-78. On May 24, 1989, the district court vacated its ruling on Seismograph's motion for judgment NOV or new trial on Geophysical's unfair competition claim. Exhibit E, SER at 17-18. The court decided that it would withhold ruling on Seismograph's motion until the second trial concluded.

[7] Because we conclude that judgment NOV should have been granted in Seismograph's favor, we need not reach other issues raised by the parties regarding the unfair competition claim, remittitur on that claim, or post-judgment interest.

evidence as alleged by Geophysical could not reasonably support a verdict in its favor under California's unfair competition law. Specifically, Geophysical has not met its burden of proving either that it suffered a competitive injury or that there was injury to the consuming public within the meaning of the statute.

Geophysical alleges that it was in competition with Seismograph and that the deal it struck with Seismograph inflicted losses on Geophysical. The evidence presented by Geophysical is insufficient to support a verdict in its favor under section 17200 of California's Business and Professions Code. Nothing in the evidence shows that Geophysical was injured beyond the risk of loss that any party entering into a contract to buy goods assumes.

In response to Seismograph's contentions on cross-appeal, Geophysical argues that the statutory requirement of competitive injury is satisfied merely by proving that Geophysical was a competitor and that it was injured. To support its argument, Geophysical relies on the California Supreme Court's opinion in Barquis v. Merchants Collection Ass'n, 496 P.2d 817, 828 (Cal. 1972).

The argument fails. Barquis merely stands for the proposition that California's unfair competition statute protects consumers as well as competitors from unfair business practices. Contrary to Geophysical's characterization of the case, Barquis does not hold that injury to a competitor satisfies the statutory definition of competitive injury. Rather, Barquis refers specifically to the statutory requirement of proving an "unfair injury to a competitor." Id. (emphasis added). The evidence presented by Geophysical to show competitive injury fails to meet this requirement.

As a final argument, Geophysical attempts to portray itself as an injured consumer. This argument also fails. Geophysical was a commercial purchaser of equipment from Seismograph. This was not what the California legislature had in mind when it extended protection against unfair competition "to the entire consuming public." See id.

CONCLUSION

For the reasons set forth above, the district court's decision is affirmed in part and reversed in part. Accordingly, we remand to the district court for entry of judgment NOV on the unfair competition claim.

AFFIRMED IN PART, REVERSED IN PART, REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS DISPOSITION.

FILED: February 11, 1993

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-56373
CT/AG#: CV-85-8359-AWT

GEOPHYSICAL SYSTEMS CORPORATION

Plaintiff-Appellant

v.

RAYTHEON COMPANY INC.; SEISMOGRAPH SERVICE CORPORATION

Defendants-Appellees.

No. 90-56374
CT/AG#: CV-85-8359-AWT

GEOPHYSICAL SYSTEMS CORPORATION

Plaintiff-Appellee)

v.

SEISMOGRAPH SERVICE CORPORATION

Defendant-Appellant

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard from the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the same District Court in this cause be and hereby is AFFIRMED IN PART, REMANDED.

Filed and entered February 11, 1993.

APPENDIX C

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEOPHYSICAL SYSTEMS Plaintiff-Appellant v. RAYTHEON COMPANY INC.; SEISMOGRAPHIC SERVICE CORP., Defendants-Appellees.	Nos. 90-56373, 90-56374 D.C. No. CV-85-8359-AWT O R D E R

Before: TANG, PREGERSON, and ALARCON, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge has requested an en banc hearing. Federal Rule 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Filed: May 3, 1993

APPENDIX D

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GEOPHYSICAL SYSTEMS CORP., a California Corporation,	)	Case No. CV 85-8359 AWT (Kx)
Plaintiff,	)	ORDER RE DIRECTED
v.	)	VERDICT II

RAYTHEON COMPANY, INC., a Delaware Corporation, and SEISMOGRAPH SERVICE CORP., a Delaware Corporation, Defendant.	)	Date: Dec. 6, 1988 Time: 9:00 a.m. Courtroom: 6 Before the Honorable A. Wallace Tashima Trial Date: Nov. 1, 1988

Defendants have filed a Motion for Directed Verdict Re GSC's Fraud and Negligent Misrepresentation Claims. Having considered the motion and the arguments of counsel, Defendants' motion is granted.

The motion is granted on the basis that these claims are governed by the two-year limitation period under Oklahoma law and that plaintiff should have, and actually did, discover[ed] the fraud well before more than two years before commencement of this action.

IT IS ORDERED that all of plaintiff's Fraud and Negligent Misrepresentation Claims are dismissed on the merits.

Dated: December 6, 1988

/s/
A. WALLACE TASHIMA
United States District Judge

APPENDIX E

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GEOPHYSICAL SYSTEMS CORP., a California Corporation,	)	Case No. CV 85-8359 AWT (Kx)
Plaintiff,	)	ORDER RE
v.	)	MOTION TO RECONSIDER RULING ON

SEISMOGRAPH SERVICE CORPORATION a Delaware Corporation,	)	MOTION FOR JNOV OR FOR A NEW TRIAL
Defendant.	)	DATE: November 6, 1989
	)	TIME: 10:00 a.m.
	)	Before the Honorable
	)	A. Wallace Tashima

Defendant Seismograph Service Corporation ("SSC") has filed a Motion asking the Court to reconsider its previous ruling on SSC's Motion for jnov or for a new trial. GSC opposes SSC's Motion.

After reviewing the entire record, including the Court's rulings and jury instructions at the first trial, the written arguments of counsel in support of and in opposition to SSC's Motion, and the oral arguments presented at the hearing held on SSC's Motion, the Court finds that SSC's Motion should be granted, in part.

SSC bases its motion on the change in California law which began with Foley v. Interactive Data Corp., 47 Cal. 3d 654, 254 Cal. Rptr. 211, 765 P.2d 373 (1988). Foley and the cases following Foley have reversed the previous direction of California law and established that a claim for breach of the implied covenant of good faith and fair dealing is a purely contractual claim absent special factors not present in the pending dispute. See Newman v. Emerson Radio Corp., 48 Cal. 3d 973, 258 Cal. Rptr. 592, 772 P.2d 1059 (1980); Mundy v. Household

Finance Co., ___ F.2d ___, 1989 U.S. App. LEXIS 13485 (9th Cir. 1989); S.O.S., Inc. v. Payday, Inc., ___ F.2d ___, 1989 U.S. App. LEXIS 13763 (9th Cir. 1989); Oki America, Inc. v. Microtech International, Inc., 872 F.2d 312 (9th Cir. 1989) (concurring opinion); Miller v. Fairchild Industries, Inc., 876 F.2d 718 (9th Cir. 1989); DeHorney v. Bank of American National Trust and Savings Association, 879 F.2d 459 (9th Cir. 1989); Mitsui Manufacturer Bank v. Superior Court, 212 Cal. App. 3d 726, 260 Cal. Rptr. 793 (1989); Price v. Wells Fargo Bank, ___ Cal. App. ___, 1989 Cal.App.LEXIS 869 (1980). Because of the recent changes in California law, SSC's Motion to Reconsider is granted.

In light of Foley and the cases following Foley, the Court concludes that GSC's claim for breach of the implied covenant of good faith and fair dealing is a purely contractual claim. Because GSC's claim for breach of the implied covenant of good faith and fair dealing is a purely contractual claim, (A) it is governed by the four year statute of limitation of Cal.Com.Code § 2725 and (B) it is not subject to a discovery rule. GSC's claims for breach of the implied covenant of good faith and fair dealing accrued when the conduct giving rise to any breaches occurred.

Further, in light of Foley and the recent developments and clarifications of California law, the Court concludes that its jury instructions applying the discovery rule to GSC's claim of breach of the implied covenant of good faith and fair dealing were incorrect.

GSC filed its present action on December 23, 1985. SSC is entitled to judgment as a matter of law on all portions of GSC's claim of breach of the implied covenant

of good faith and fair dealing which accrued prior to December 23, 1981. The Court, accordingly, grants jnov against GSC and for SSC on all claims of breach of the implied covenant of good faith and fair dealing which accrued prior to December 23, 1981. The Court, accordingly, grants jnov against GSC and for SSC on all claims of breach of the implied covenant of good faith and fair dealing related to conduct on the part of SSC that occurred before December 23, 1981.

Because it is necessary to grant jnov with regard to GSC's claim that SSC breached the implied covenant of good faith and fair dealing before 12/13/81, a new trial is necessary on GSC's remaining claims. Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19, 29-30, 82 S.Ct. 1130, 1135-1136, 8 L.Ed.2d 305 (1962); Brocklesby v. United States, 767 F.2d 1288, 1294 (9th Cir. 1985); Syufy Enterprises v. American Multicinema, Inc., 793 F.2d 990, 1001 (9th Cir. 1986); Brett v. Hotel, Motel, Restaurant, Construction Camp and Bartenders Local 879, 828 F.2d 1409, 1426 (9th Cir. 1987).

SUMMARY:

1. The Court grants SSC's Motion to Reconsider, in part.

2. The Court grants SSC's Motion for JNOV against GSC and for SSC on all claims of breach of the implied covenant of good faith and fair dealing related to conduct on the part of SSC that occurred before December 23, 1981.

3. The Court denies SSC's Motion for JNOV against GSC and for SSC on all claims of breach of the implied covenant of good faith and fair dealing after December 23, 1981.

4. The Court grants SSC's Motion for a New Trial on GSC's breach of warranty claims, and the remaining breach of the implied covenant claim.

5. The new trial shall concern all and only issues relating to liability and damages on GSC's claims (A) that SSC breached the express warranty in the February 1981 contract, (B) that SSC breached an implied warranty of fitness for a particular purposes associated with the February 1981 contract, and (C) that SSC breached the implied covenant of good faith and fair dealing after December 23, 1981.

IT IS SO ORDERED.

FURTHER ORDERED that discovery on "causation" is reopened for a 60-day period to Jan. 24, 1990.

DATED: November 21, 1989

/s/
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GEOPHYSICAL SYSTEMS CORP., etc.,	
Plaintiff,	No. CV 85-8359 AWT
v.	ORDER RE CERTAIN POST-TRIAL MOTIONS
RAYTHEON COMPANY, INC., etc.,	
Defendant.	

This action has now been tried twice to a jury. Still pending from the first triai is defendant's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial on plaintifff's unfair competition claim. Ruling on that motion was held in abeyance by the Court, pending retrial of the warranty and contract-based claims. The Court was able to do this because of its determination that if a new trial were to be held, it would be a court trial. This ruling, in turn, was based on the Court's conclusion that because California's unfair competition statute authorizes only equitable relief, there was no right to trial by jury on such claim.

After the second trial, plaintiff moved for the entry of judgment on its unfair competition claim in the sum of $1,924,515. These motions have now been argued and submitted. Further, at the hearing on these motions, the Court asked plaintiff to indicate whether it would be willing to accept a remittitur of all damages in excess of $1,924,515 on its unfair competition claim in lieu of granting defendant's motion for new trial, at least as to damages, on that claim. Plaintiff, or August 10, 1990, filed its acceptance of the remittitur.

The Court denies the motion for JNOV and for a new trial on liability. The Court is satisfied that the instructions given to the jury on this claim correctly stated the law and that the evidence is sufficient to support the verdict of liability on this claim. Further, error and prejudice on the other claims did not infect this claim. Since defendant's objection as to a jury trial on this claim was not made until after the first trial, it was waived as to the first trial.

On the amount of "restitution," the court has several comments. First, at the first trial, the parties agreed as to the proper amount of restitution as $1,924,515. On that basis, that amount was included in the instructions. Second, the Court agrees with plaintiff that the only logical basis of the amount of the verdict was for the jury to have added the restitution amount to the amount of damages determined by plaintiff's damage expoert, George Strong. Third, plaintiff has intimated that if there is a new trial, it will seek substantially greater restitution -- in the $12 million range. Based on the

testimony thus far however, the Court does not find that "restitution" in this case exceeds the "stipulated" amount of $1,924,515.

The Court further concludes that plaintiff is entitled to prejudgment interest on the amount of restitution under Cal. Civ. Code §3287(a). It cannot be disputed that the amount involved is a sum certain. Since this claim for restitution arises under plaintiff's unfair competition theory, the Court finds that the first demand for restitution was the initial complaint in this action. Thus, prejudgment interest will be awarded from December 23, 1985, the date the action was commenced. The applicable rate under state law is seven percent (7%) per annum. Cal. Civ. Code §1916-1; see also Cal. Civ. §3289. Computed in accordance with these requirements, plaintiff shall be awarded prejudgment interest in the amount of $625,937.65. Moreover, regardless of plaintiff's right to prejudgment interest under statute, the Court finds as an equitable matter, that plaintiff should receive prejudgment interest, as calculated above, to make it whole. Otherwise, given the delays in this case, restitution would not be an adequate remedy.

IT IS ORDERED:

1. Defendant's motion for JNOV or, in the alternative, for a new trial on the unfair competition claims is DENIED.

2. Based on plaintiff's acceptance of a remittance, remitting all amounts on the unfair competition claim in excess of said sum, judgment shall be

entered in plaintiff's favor in said claim in the sum of $1,924,515, together with prejudgment interest in the sum of $625,937.65.

Dated: August 13, 1990

/s/
A. WALLACE TASHIMA
United States District Judge

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

GEOPHYSICAL SYSTEMS CORP., etc.,	
Plaintiff,	No. CV 85-8359 AWT
v.	JUDGMENT ON VERDICTS
RAYTHEON COMPANY, INC., etc.,	
Defendant.	

This action having been tried twice to a jury,

IT IS ADJUDGED:

1. In accordance with the verdict in the first trial, after remittitur of excess amounts by plaintiff, Geophysical Systems Corporation shall recover from defendant Seismograph Service Corporation, on its unfair competition claim, the sum of $1,924,515, together with prejudgment interest of $625,937.65, for a total award of $2,550,452.65.

2. In accordance with the verdict in the second trial, plaintiff shall recover nothing on all of its remaining claims and said claims are dismissed on the merits.

3. Pursuant to 28 U.S.C. §1961(a), this judgment shall bear interest at the rate of 7.88 percent per annum.

4. Each party shall bear its own costs. Local Rule 16.2.3.

Dated: August 13, 1990

/s/
A. WALLACE TASHIMA
United States District Judge

APPENDIX H

CALIFORNIA BUSINESS AND PROFESSIONS CODE

§ 17200. Unfair competition; law governing. As used in this chapter, unfair competition shall mean and include unlawful, unfair or fraudulent business practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code.

APPENDIX I

OKLAHOMA STATUTES TITLE 12

UNIFORM STATUTE OF LIMITATION
ON FOREIGN CLAIMS ACT

§ 105. Law governing. The period of limitation applicable to a claim accruing outside of this state shall be that prescribed either by the law of the place where the claim accrued or by the law of this State, whichever last bars the claim.